

Electronically Filed
Supreme Court
SCAD-23-0000396
21-JUL-2025
09:28 AM
Dkt. 48 OPC

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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OFFICE OF DISCIPLINARY COUNSEL,
Petitioner,

vs.

MARK R. ZENGER,
Respondent.

SCAD-23-0000396

ORIGINAL PROCEEDING
(CASE NO. DB 19-9001)

JULY 21, 2025

CONCURRING OPINION BY GINOZA, J.

Given the uncontested findings accepted by the Disciplinary Board (**Board**), I concur that the disciplinary proceeding against Respondent Mark R. Zenger (**Zenger**) should be dismissed because his conduct during the February 28, 2018 chambers conference did not constitute a violation of Hawai'i Rules of Professional Conduct (**HRPC**) Rules 3.5(c) or 4.4(a).

I write separately, however, for several reasons.

First, given the majority's decision to publish its opinion in this case, we should reinforce the importance of civility in the legal profession, as this court has done in other opinions. See Bettencourt v. Bettencourt, 80 Hawai'i 225, 228-30, 909 P.2d 553, 556-58 (1995) (in referring appellant's counsel to the Office of Disciplinary Counsel (ODC), this court discussed the lack of civility in appellant's opening brief, which did "not comport with the precepts embodied in the preamble to the HRPC," and was a "kind of incivility" that is "demeaning to the legal profession and should not be tolerated"); Matter of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 17-18, 868 P.2d 419, 435-36 (1994) (Levinson, J., concurring) (addressing Hawai'i Rules of Civil Procedure Rule 11 sanctions, stating that lawyers "represent their clients' interests best when they discharge their responsibilities in accordance with the preamble to the [HRPC]" and "the necessity for civility is relevant to lawyers because they are . . . living exemplars – and thus teachers – every day in every case and in every court; and their worst conduct will be emulated . . . more readily than their best" (quoting former Chief Justice Burger in his address to the American Law Institute, Washington, D.C., reported in the National Observer, May 24, 1971, and reprinted in David S. Schrager and Elizabeth Frost, The Quotable Lawyer 193 (1986))).

Although this court reaches a conclusion different than the Board, the concerns expressed by the Board are understandable. Respondent himself recognized that raising his voice in the chambers conference was unprofessional. Respondent also testified that he regretted using profanity during the chambers conference, using the words "bullshit" and "horseshit."¹

¹ In his testimony to the Hearing Officer, Respondent testified about his use of profanity during the chambers conference as follows:

Q Did you use any profanity?

A Yes, I did.

Q What profanity did you use during --

A I --

Q -- the in[-]chambers conference?

A I uttered the words, bullshit, and I uttered the word, horseshit.

Q When you used those words, what were you referring to?

A I was referring to the discussion that was leading to allowing me more time to file the response to statement to the motion to set. I was trying to get it to March 23rd.

Q So what were you -- why you why were you using the terms, horseshit and bullshit?

A To --

Q What were you referring to?

A Referring to the resistance by the court and the arguments to the -- referring to the arguments to the court and the way that the arguments were going with respect to not giving me more time.

Q Were you calling the court?

A No. I was saying --

Q The Court's arguments being horseshit and bullshit?

Recently, the 2023 Bench-Bar Conference addressed concerns about a perceived increasing lack of civility in the bench and bar. The Hawaii State Bar Association Committee on Judicial Administration, Report of the 2023 Bench-Bar Conference, Haw. Bar J., May 2024, at 4. As noted in the report, ODC may take action against incivility that is in violation of the HRPC Rules, but even when incivility does not

A No. I was saying that the mere fact that was being requested enforced and not agreed to bullshit and horseshit.

Q Who was requesting what?

A Ms. Joroff had already set the hearing for March 7th. I was trying to convince the judge to move the date back, because it was not reasonable or even possible to get the position statement filed by that time and it was than is allowed by law.

Q So when you use the term, horseshit and bullshit, what were you referring to?

A The arguments that I should not -- I did not have the right to more time.

Q Whose arguments were those?

A Ms. Joroff's.

Q Do you regret now using those words?

A I do.

Q In sight -- in hindsight, would you have used different words?

A Yes. I would have used different words.

Q What would you have said instead?

A Specious. Words like specious, frivolous, meritless, unfair, unreasonable, words of that nature.

rise to that level, "members of the bench and bar should endeavor to practice and promote civility to maintain harmony across the profession." Id. at 7.

Although the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers (**Guidelines**) are aspirational and may not be used for disciplinary charges, they are helpful and provide common-sense guidance to assist attorneys in recognizing conduct they should avoid. The Guidelines aim to "assist all in the legal profession . . . in conducting themselves in a manner that is fair, efficient, and humane." Guidelines Preamble (2018). The Guidelines are "offered for the guidance of lawyers . . . as well as for reference by the courts." Id.

Appellate and trial courts have referenced the Guidelines in situations involving sanctions. See, e.g., Erum v. Llego, 147 Hawai'i 368, 393 n.46, 465 P.3d 815, 840 n.46 (2020) (reviewing whether monetary sanctions were reasonable, noting that the record did not show that defendant "made an effort to informally resolve [plaintiff's] failure to timely file a pretrial statement, as the [Guidelines] recommend[,] and explaining that costs and fees incurred by defendant may have been avoided if such an effort had been made); State v. Talo, No. CAAP-20-0000565, 2022 WL 1640808, *2 (Haw. App. May 24, 2022) (SDO) (reviewing sanction against criminal defense counsel for conduct at a court hearing, noting that the supreme court

has cited the Guidelines, and determining that the circuit court did not err in referencing the Guidelines in a "see also" citation to support its conclusion that appellant's "unprofessional conduct failed to comport with ethical standards for arguments to a tribunal" (citing Erum, 147 Hawai'i at 393 n.46, 465 P.3d at 840 n.46)); Hall v. Dep't of Land & Nat. Res., No. CAAP-17-0000382, 2022 WL 1284351, *5-6 (Haw. App. Apr. 29, 2022) (SDO) (reviewing a discovery sanctions order, quoting the Guidelines and determining that the circuit court's reference to the Guidelines in its order "appears to have been for the purpose of avoiding future disputes, and not as a basis for the sanctions"); cf. Chen v. Mah, 146 Hawai'i 157, 173 n.15, 457 P.3d 796, 811 n.15 (2020) (quoting Guidelines Section 2(a) in interpreting Hawai'i Rules of Civil Procedure 12(a) to support the proposition that parties "often provide the courtesy of informally extending [the] time for answering complaints without court involvement").

Second, whereas the Guidelines are not a basis for imposing attorney discipline, nor should Zenger's reputation be pertinent here. Reputation and evidence of good character can be a mitigating factor "that may justify a reduction in the degree of discipline to be imposed." American Bar Association Standards for Imposing Lawyer Sanctions (2019), Standard 9.31 and 9.32(g); see also Off. of Disciplinary Couns. v. Au, 107

Hawai'i 327, 345 n.8, 113 P.3d 203, 221 n.8 (2005) (listing the mitigating factors that may be considered to justify a reduction in the degree of discipline). Here, because there is no discipline being imposed, raising Zenger's reputation or character is not pertinent. The majority states that Zenger is "an attorney since 1983 with a spotless professional record," and highlights glowing opinions about him, including testimony that he is a "zealous advocate[,] " "considered on [Kaua'i] a top tier litigator[,] " frequently does pro bono work, and has moral character and integrity. These are all laudable characteristics. But it seems misplaced to extol Zenger's reputation in the context of this case. In my view, the effort to raise Zenger's profile impliedly and unfairly conveys a sentiment that Stacey Joroff's experience in chambers that led to her filing a disciplinary complaint was groundless. It also imparts a sense that Joroff's actions warranted the conduct at issue and that Zenger's conduct in chambers expressing his "reasonable complaints" about Joroff's actions were part of his admirable zealous advocacy. Praising Zenger's reputation is not pertinent here and serves to implicitly and unnecessarily disparage Joroff.

In sum, I concur that Respondent's conduct in the chambers conference did not violate HRPC 3.5(c) or 4.4(a).

However, for the reasons stated above, I do not join the majority opinion.

/s/ Lisa M. Ginoza

